IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARMEN BONORA	:	
	:	CIVIL ACTION
v.	:	No. 99-5539
UGI UTILITIES, INC.	:	

O'Neill, J. October , 2000

M E M O R A N D U M

Presently before me is defendant's motion for summary judgment on all counts. For the reasons stated below, the motion will be granted as to plaintiff's hostile work environment claim and denied as to plaintiff's retaliation claim.[1]

BACKGROUND

Plaintiff Carmen Bonora claims that she was subjected to unlawful sexual harassment and retaliation during her employment with defendant UGI Utilities. Bonora began working at UGI in 1990, but her problems began in 1994 after she was transferred to the Regulatory Compliance Department and Larry Angulo became her supervisor. Specifically, Bonora alleges the following incidents of unwelcomed touching by Angulo:

[1] The complaint contains two counts: sex discrimination under Title VII (Count I) and sex discrimination under the Pennsylvania Human Relations Act (Count II). However, Title VII and the PHRA are generally interpreted to be consistent with one another. See Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). Therefore, I will address plaintiff's hostile work environment and retaliation claims (which are separately cognizable under both Title VII and the PHRA) as if they were separate counts.

- Sometime during the summer of 1994, Angulo touched Bonora's waist with his fingers while they were riding in an elevator with several other people. See Bonora Dep. at 98-101. Bonora felt that this contact was inappropriate, but she could not tell if it was sexual in nature. Id. at 101-102. She did not report the incident to anyone in management or Human Resources. Id. at 101.
- On two to four occasions during 1995, Angulo allegedly brushed his buttocks against Bonora's buttocks when they were working in the same area. Id. at 105. Bonora described these incidents as "very brief brushing." Id. at 106. She further conceded that if Angulo had said "excuse me" she "would have thought nothing of it." Id.
- On another occasion in 1995, Angulo was helping her put supplies in a closet and "he took the box that he had and bumped my back with it, my backside with it." Id. Bonora testified that Angulo did this "kind of playfully," and she did not feel that this touching was sexual. Id. at 107, 110.

In October 1995, Bonora and another women complained to Stephen Borza, UGI's Manager of Human Resources for the Central Area, that Angulo was engaging in inappropriate behavior. Id. at 115-17. Angulo "unequivocally denied" the allegations of inappropriate touching. See Borza Dep. at 14. After interviewing at least six employees, Borza concluded that there was insufficient evidence to substantiate the complaints against Angulo and, even if the complaints were substantiated, they did not rise to the level of a hostile work environment. Id. at 37-38. Despite that conclusion, Borza met with Angulo to review the UGI sexual harassment policy and warn him that "any future substantiated action or activity" in violation of the policy

would result in disciplinary action "up to and including termination." Id. at 14-15.

Bonora testified that, at least initially, Borza's warning to Angulo was effective. As she put it: "[O]nce I talked to Mr. Borza, [Angulo] kept his buttocks to himself." See Bonora Dep. at 108. She also testified that no further incidents of unwelcomed touching occurred from November 1995 to April 1996. Id. at 141.

Beginning in April 1996, however, Angulo's alleged misconduct began anew and now included retaliation for Bonora's earlier complaint:

- On April 1, 1996, Angulo criticized Bonora's job performance and told her there were other employees who would be happy to have her position. Id. at 142. She felt that this comment was retaliatory. Id. at 143-47.
- On May 3, 1996, Angulo allegedly looked at Bonora's chest during a meeting. Id. at 150. She did not complain about this behavior to anyone in management or human resources. Id. at 153.
- On May 31, 1996, Angulo allegedly touched Bonora's hand while handing a file to her. Id. at 159. She felt this contact was offensive and "unnecessary." Id. at 160.
- Also on May 31, 1996, Angulo announced that in the future the two employees in the Regulatory Compliance Department would not be permitted to take a full week vacation during the months of April, May or June because that was the Department's busiest period. Id. at 156. Bonora felt this policy constituted retaliation against her and she complained to the Human Resources Department. Id. at 156-57, 162, 169. Borza, along with Angulo's supervisor, Stephen Shull,

investigated Bonora's complaint. See Shull Dep. at 15. Shull created a graph showing the number of cases handled by the Regulatory Compliance Department per month from 1993 to 1997. Id. at 30. The graph showed that April, May and June were generally the busiest months for that Department. Id. at 30-31. Borza and Shull therefore concluded that Angulo had a legitimate business reason for limiting vacations during this period and that he was not retaliating against Bonora. Id. at 31-32.

- On August 30, 1996, Bonora was holding a door open for Angulo and "he reached across and, on purpose, touched [her] bare forearm with his two fingers." Id. at 178.
- On May 9, 1997, Bonora left work early because she was not feeling well. Id. at 207-08. Although Bonora and a temporary employee were the only individuals working that day, Bonora left without telling the other employee. Id. at 208. When Angulo criticized Bonora for not informing her coworker that she was leaving, Bonora refused to discuss the matter. Id. at 209. Angulo sent Bonora an email stating: "[I]n the future, should I not be around, let your coworkers know when you are sick and need to go home early. Thanks." Id. at 214-15, Exhibit 7.
- In May 1999, Bonora requested permission to take vacation during the week before Memorial Day. See Borza Dep. at 29. Pursuant to the policy that had been adopted in 1996, Bonora was permitted to take the Monday, Tuesday and Wednesday of that week as vacation, but she was expected to work on Thursday and Friday. Id. Bonora called in sick that Thursday and Friday prior to the

holiday weekend. Id.. When Bonora returned to work, Angulo asked her to provide a doctor's note to confirm that she was actually sick on the days she was absent. Id. Bonora acknowledges that the timing of her absence was suspicious, yet alleges that Angulo's conduct in requesting a doctor's note was retaliatory. See Bonora Dep. at 230-34.

- In August 1999, Bonora was transferred to the position of Senior Credit Representative in the Central Credit Department where she would no longer have to work with Angulo. Id. at 52-53. Bonora concedes that her job grade and rate of pay did not change. Id. at 53. However, her job description changed substantially and she viewed the transfer as a demotion. Id. The new position had "differences in overtime," was "less challenging intellectually," and required her to deal with less desirable clientele. Id. at 60, 67.

Bonora filed a complaint with the Pennsylvania Human Relations Commission on June 11, 1997. She commenced this action on November 8, 1999 and resigned from UGI on November 19, 1999.

DISCUSSION

A. Standard for Summary Judgment

Rule 56 empowers a court to enter summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Initially, the moving party must state the basis for its motion and identify those portions of the record which it believes indicate the absence of any genuine issue of material fact.

See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the burden of persuasion at trial, it may properly support its motion merely by showing that there is an absence of evidence to support the non-moving party's case. Id. at 325.

In response to a properly supported motion for summary judgment, the non-moving party must point to specific facts demonstrating that a genuine issue exists for trial. See Fed. R. Civ. P. 56(e). It may not rest upon unsupported allegations or denials. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "mere scintilla of evidence" supporting the non-moving party's position is insufficient to create a genuine issue of material fact; there must be sufficient evidence from which a jury could reasonably find for the non-moving party. Id. at 252.

The court must view all evidence in the light most favorable to the non-moving party. Id. at 255. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts" should be left to the jury. Id.

B. Hostile Work Environment Claim

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court first recognized claims for hostile work environment sexual harassment under this provision of Title VII. However, the Court emphasized that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." Id. at 67. Rather, "[f]or sexual harassment to

be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. (internal quote omitted).

The Court elaborated on this standard in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). In order to be actionable under Title VII, the work environment must be both objectively and subjectively offensive. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." Id. at 21-22. In judging whether a work environment is objectively hostile, courts are to look "at all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23. The conduct at issue "must be extreme to amount to a change in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). "In short, what is illegal is a 'hostile work environment,' not an 'annoying work environment'." Lynch v. New Deal Delivery Serv. Inc., 974 F. Supp. 441, 452 (D.N.J. 1997).

When measured against the factors outlined in Harris, I conclude that the conduct complained of in this case was not sufficiently severe or pervasive to constitute a hostile work environment. Bonora alleges that over the course of approximately two years Angulo: 1) touched her waist on one occasion; 2) brushed his buttocks against hers on two to four occasions; 3) bumped her backside with a box on one occasion; 4) looked at her chest during a meeting on one

occasion; 5) touched her hand on one occasion; and 6) touched her arm on one occasion.[2] There is no evidence that Angulo propositioned Bonora or otherwise used inappropriate language with her. This conduct was not sufficiently severe because it was not physically threatening or intimidating and, in many cases, could be characterized as incidental conduct that was void of sexual overtones. In fact, Bonora concedes that the incidents where Angulo allegedly brushed his buttocks against hers, the incidents that could most easily be characterized as sexual, constituted "very brief brushing" and she "would have though nothing of it" if Angulo had said "excuse me." See Bonora Dep. at 106. Moreover, the conduct was not sufficiently pervasive because plaintiff complains of less than ten incidents over the course of approximately two years. At worst, this conduct constituted "simple teasing . . . and isolated incidents [that did] not amount to discriminatory changes in the terms and conditions of employment." Faragher, 524 U.S. at 788 (internal quotes omitted).

Moreover, the conduct alleged in this case is less severe and pervasive than numerous other cases where summary judgment has been entered against employees who complained of hostile work environments. See, e.g., Bowman v. Shawnee State Univ., 220 F.3d 456 (6th Cir. 2000) (affirming grant of summary judgment; incidents where superior rubbed employee's shoulders, grabbed employee's buttocks, and placed finger on employee's chest were not

[2] Defendant argues that I should discount the alleged incidents of harassment that occurred more than 300 days prior to the filing of plaintiff's complaint with the Pennsylvania Human Relations Commission. See West v. Philadelphia Elec. Co., 45 F.3d 744, 754 n.8 (3d Cir. 1995). If I accepted that view, the only incident under consideration would be the arm touching incident that occurred on August 30, 1996. Plaintiff responds that all of the alleged incidents of harassment can be considered under the continuing violation theory. However, I need not resolve whether the continuing violation theory is applicable here because even if all of the alleged incidents of harassment are considered the conduct was not sufficiently severe or pervasive to be actionable under Title VII.

sufficiently severe or pervasive to create a hostile work environment); Adusumilli v. City of Chicago, 164 F.3d 353 (7th Cir. 1998) (affirming grant of summary judgment; incidents where co-employees teased plaintiff, made sexual jokes aimed at her, repeatedly stared at her chest, and on four occasions made unwelcomed contact with her arm, fingers, and buttocks were not sufficiently severe or pervasive to create a hostile work environment); Weiss v. Coca-Cola Bottling Co. of Chicago, 990 F.2d 333 (7th Cir. 1993) (affirming grant of summary judgment; incidents where supervisor repeatedly asked employee about her personal life, told her how beautiful she was, asked her out on dates, called her a "dumb blond," put his hands on her shoulders at least six times, placed "I love you" signs in her work area, and tried to kiss her on three occasions were not sufficiently severe or pervasive to create a hostile work environment); McGraw v. Wyeth-Ayerst Labs., Inc., No. 96-5780, 1997 WL 799437, at *5-6 (E.D. Pa. Dec. 30, 1997) (granting summary judgment; incidents where employee was subjected to unwelcomed kissing, touching, and "constant" requests for a date were not sufficiently severe or pervasive to create a hostile work environment); Cooper-Nicholas v. City of Chester, No. 95-6493, 1997 WL 799443, at *3 (E.D. Pa. Dec. 30, 1997) (granting summary judgment; approximately eight incidents of "unprofessional, offensive, and callow" sexual remarks over the course of nineteen months is not sufficiently "frequent or chronic" to create a hostile work environment"); Garcia v. ANR Freight Sys., Inc., 942 F. Supp. 351 (N.D.Ohio 1996) (granting summary judgment; incidents where supervisor grabbed the back of employee's head and guided it towards his lap, asked employee if he could spend the night in her hotel room, and brushed his hand against her chest were not sufficiently severe or pervasive to create a hostile work environment); See also Baskerville v. Culligan Int'l. Co., 50 F.3d 428 (7th Cir. 1995) (reversing jury verdict in favor of

employee; nine incidents of offensive behavior over seven months including the use of sexual innuendo and one instance of simulated masturbation were not sufficiently severe or pervasive to create a hostile work environment).

Finally, plaintiff argues that Angulo's conduct was sufficiently severe and pervasive because defendant's sexual harassment policy defined sexual harassment to include "physical contact such as touching, patting, or pinching" but did not qualify the degree of such contact that was necessary to constitute a hostile work environment. This argument fails for two reasons. First, although defendant's policy contains no explicit qualification, some qualification would necessarily have to be read in or else the document would be rendered absurd. Under plaintiff's interpretation of the policy, even a single, arguably-incidental contact would create a hostile work environment. Second, the interpretation of defendant's internal sexual harassment policy is irrelevant to the question of its liability under Title VII.[3] Defendant's liability under Title VII is to be determined by reference to Meritor and its progeny, not by any self-imposed, higher standard.

Therefore, plaintiff was not a victim of a hostile work environment and summary judgment will be entered in favor of defendant on that portion of plaintiff's Title VII and PHRA claims.

C. Retaliation Claim

[3] Of course, this statement may not be true in the context of the affirmative defense to vicarious liability in sexual harassment cases that the Supreme Court created in Faragher, 524 U.S. at 807 and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). However, that affirmative defense is not at issue in this case.

Title VII makes it an unlawful employment practice for an employer to discriminate against an employee "because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." See 42 U.S.C. § 2000e-3(a). To establish a claim for retaliation, a plaintiff must demonstrate that: "(1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action." Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995).

However, the conduct at issue "must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment [such that] the alleged retaliation constitute[s] adverse employment action." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (internal quotes omitted). "[N]ot everything that makes an employee unhappy qualifies as retaliation, for otherwise minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." Id., quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996).

Most of the allegedly retaliatory conduct that Bonora complains of can be dismissed as "minor and . . . trivial" in the sense that phrase was used in Robinson. Specifically, Angulo's email to Bonora criticizing her for leaving work without informing her coworker and Angulo's request for a doctor's note to confirm that she was really sick on the Thursday and Friday before Memorial Day in 1999 were not serious enough to constitute an adverse employment action.[4] Cf.

[4] In fact, although Bonora is entitled to have the evidence viewed in the light most favorable to her for the purposes of this motion, a reasonable person could conclude that Angulo's actions were appropriate in both instances.

Robinson, 120 F.3d at 1300 (finding that "unsubstantiated oral reprimands" and "unnecessary derogatory comments" do not rise to the level of an adverse employment action). However, there are two incidents that could be characterized as adverse employment actions.

The first such incident is the May 1996 policy change whereby employees in the Regulatory Compliance Department were no longer permitted to take a full week vacation during the months of April, May or June. Defendant argues that this was a "minor limitation on scheduling vacations" that was made for a legitimate business reason; namely, those three months were the busiest months for that Department. This argument is insufficient to justify entry of summary judgment against plaintiff. In my view, although the limitation on vacation time was arguably minor, it clearly did alter the "terms, conditions, and privileges" of Bonora's employment and therefore could constitute an adverse employment action. But see Dedner v. Oklahoma, 42 F. Supp.2d 1254, 1258 (E.D. Okla. 1999) ("A refusal to allow an employee to have specified days off from work . . . does not amount to 'a significant change in employment status' as defined by the Supreme Court."). Moreover, whether the change was made for a legitimate business reason or was a mere pretext to retaliate against Bonora is a question of fact that could only be resolved by the jury. However, the policy change in question was announced on May 31, 1996, and Bonora's first complaint to the PHRC was filed more than a year later on June 11, 1997. Therefore, this incident must be discounted because it occurred more than 300 days before Bonora's complaint to the PHRC. See United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."); West v. Philadelphia Elec. Co., 45 F.3d 744, 754, n.8 (3d Cir. 1995) (a charge must be filed within 300

days after the alleged unlawful employment practice occurred).

The second incident that could amount to an adverse employment action is Bonora's transfer to the Central Credit Department. Bonora concedes that her job grade and rate of pay did not change as a result of the transfer (see Bonora Dep. at 53), and in defendant's view the inquiry should end there. I disagree. The Supreme Court has observed that a "tangible employment action in most cases inflicts direct economic harm." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998). On the other hand, the Court has also stated that an "undesirable reassignment" might constitute a tangible employment action. Id. at 765. Therefore, Bonora's transfer might qualify if was "undesirable," even though it did not result in any direct economic harm.

Viewing the facts in the light most favorable to plaintiff, I find that there is an issue of material fact regarding whether her transfer was "undesirable." Plaintiff testified that she viewed the transfer as a demotion because there were "differences in overtime," the new position was "less challenging intellectually," and it required her to deal with less desirable clientele. Id. at 60, 67. A reasonable jury could conclude from these facts that the transfer was an adverse employment action that was taken in retaliation for Bonora's earlier complaints of harassment. Therefore, summary judgment on this portion of the retaliation claim is not appropriate.

An appropriate Order follows.

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CARMEN BONORA	:	
	:	CIVIL ACTION
v.	:	No. 99-5539
UGI UTILITIES, INC.	:	

:

ORDER

AND NOW, this day of October, 2000 after consideration of defendant's motion for summary judgment, and plaintiff's response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

4. The motion is GRANTED as to plaintiff's hostile work environment claim and summary judgment is entered in favor of defendant and against plaintiff on that claim; and

5. The motion is DENIED as to plaintiff's retaliation claim.

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THOMAS N. O'NEILL, JR., J.